

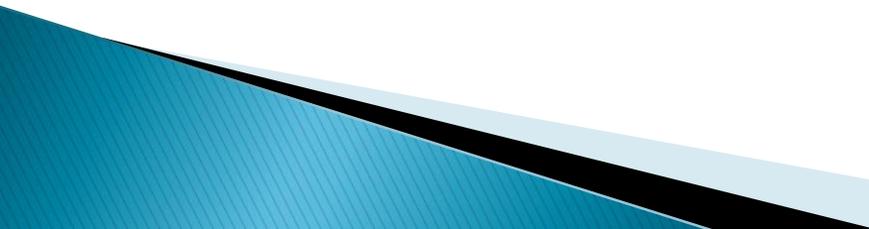
Article 7: INTERNATIONAL AND UNIFORM INTERPRETATION of the CISG

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ARTICLE 7 CISG

- 1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
- 2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

ART.7 CISG: introductory remarks

- ▶ General provision
 - ▶ Key rule within the CISG
 - ▶ Internal coherence and relationship between 7.1 and 7.2 CISG.
 - ▶ Model for other international instruments
 - UNCITRAL
 - UNIDROIT Principles of International Commercial Contracts
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INTERPRETATION OF THE CISG

- ▶ CISG has its own terminology and methodology of interpretation
 - For example, in Art. 3 the use of the terms “substantial part” and “preponderant part”, Validity (Art.4), the concepts of fundamental breach under Art. 25, specific performance in Art. 28, impediment under Art. 79, etc.
- ▶ Need to avoid:
 - Domestic reading of the CISG
 - I.e, Remainder to put the debtor in default: Contrary to Arts.59 and 78 CISG

INTERPRETATION

- Domestic interpretation
 - US Courts: Similar provisions of the CISG and The Uniform Commercial Code: Case Law on UCC applied to the interpretation of the CISG.
 - Reasoning: XXX under the CISG follows the same principles as in domestic Law, thus domestic scholarly writing and case law are pertinent to the interpretation of the CISG.
 - Safeguard: “UCC case law is not per se applicable”

GOOD FAITH

- ▶ Interpretative principle (Art.7.1 CISG)
- ▶ Compromise: *civil law v. common law*
- ▶ Manifestations of good faith as a standard of conduct are found in Arts 8, 16(2)(b), 29(2) and 80 that reflect the estoppel principle also known as the *venire contra factum proprium*, which is also a general principle of the *lex mercatoria*. It is also found in Art. 40 and in the recognition of other general principles such as the duty to cooperate, as derived from Arts 32(3) and 60(a), the loyalty principle and the principle of mitigation of damages in Art. 77.
- ▶ Extended application of the good faith principle as a substantive one.

TRENDS IN INTERPRETATION

- ▶ Literal interpretation, Legislative history
- ▶ Case Law: persuasive authority (not binding)
 - CLOUT/Digest: www.uncitral.org
 - Pace Database: www.cisg.law.pace.edu
 - CISG-Online: www.cisg-online.ch
 - Unilex: www.unilex.info (UNIDROIT Principles/CISG)
 - www.cisgspanish.com

a line needs to be drawn between plainly “wrong cases” on the CISG (i.e., parol evidence rule within CISG), as opposed to different legitimate views on the CISG (Battle of the forms).

- ▶ Scholarly writings
- ▶ GROWING TENDENCY IN CASE LAW TO USE INTERNATIONAL INTERPRETATIVE TECHNIQUES: Case law, scholarly writings and uniform law instruments: macrosystematic or dynamic interpretation of the CISG

CISG-AC: www.cisg-ac.org

▶ 17 Opinions, and 2 declarations

CASE LAW

CISG AC OPINION NO 2: Examination of the Goods and Notice of Non-Conformity Articles 38 and 39

–United States 9 September 2004 Federal District Court [State of Washington]

–Netherlands 9 March 2010 Gerechtshof [Appellate Court] Arnhem

CISG AC OPINION NO 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG

–United States TeeVee Tunes, Inc. v. Gerhard Schubert GmbH, Federal Court, Southern District of New York, 23 August 2006 .

CISG AC OPINION NO 5: The buyer's right to avoid the contract in case of non-conforming goods or documents

–*Supreme Court* (Poland) 11 May 2007.

CISG AC OPINION NO 13: Inclusion of Standard Terms under the CISG

- ▶ Netherlands 22 April 2014 Gerechtshof [Appellate Court] The Hague
- ▶ Germany 28 May 2014 Bundesgerichtshof (Supreme Court).
- ▶ Netherlands 19 August 2015 Rechtbank [District Court] Opinions 13 and 16.

CISG AC OPINION NO 16: Exclusion of the CISG under Article 6

Netherlands 19 August 2015 Rechtbank [District Court] Opinions 13 and 16.

EXTERNAL PRINCIPLES?

- ▶ FIRST INTERNAL PRINCIPLES
 - ▶ DYNAMIC INTERPRETATION
 - ▶ LAST RESORT: EXTERNAL PRINCIPLES
 - ▶ **International Principles v. Regional Principles**
 - ▶ Principles of Latin American Contract Law
 - ▶ OHADAC Principles on International Commercial Contracts, 2015) OHADAC, the Organization for the Harmonization of Business Law in the Caribbean.
 - ▶ **UNIDROIT PRINCIPLES**
 - Uncitral Endorsement (2007): “Commends the use of the Unidroit Principles 2004, as appropriate, for their intended purposes”.
- CISG AC DECLARATION NO 1: The CISG and Regional Harmonization**

COLOMBIA CASE LAW

- ▶ 09/12/2010 Corte Constitucional
 - ▶ 16/12/2010 Corte Suprema de Justicia
 - ▶ 30/08/2011 Corte Suprema de Justicia
 - ▶ 21/02/2012 Corte Suprema de Justicia
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